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No. 98-281

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In The

Supreme Court of the United States

October Term, 1997

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,

Petitioner,

vs.

CITIZEN BAND POTAWATOMI
INDIAN TRIBE OF OKLAHOMA

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the opinion by the Tenth Circuit Court of Appeals in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3rd 1325 (10th Cir. Okla. 1998) has been decided in a way that conflicts with *Shoshone v. United States*, 299 U.S. 476 (1937).

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 8

Proposition 12

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 10

Citizen Band Potawatomi Indians of Oklahoma v. United States, 6 Ind. Cl. Comm. 658 (1958) .. 9, 13, 15

Citizen Band Potawatomi v. Collier, No. CIV-92-2161, U.S.D.C. W.D. Okla. (1992) 3, 17

Citizen Band Potawatomi v. Collier, 17 F. 3d 1292, 28 Fed. R. Serv. 3d 677 (10th Cir. 1994) 4, 5, 14

Citizen Band Potawatomi Indian Tribe of Oklahoma v. L.W. Collier, Nos. 96-6219 and 96-6259 (10th Cir. 1996) 4

Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S.Ct. 3245 (1986) 10

Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States, 299 U.S. 476 (1937) 10, 12, 15, 16, 17, 18

U.S. v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941) 19

Walker v. Mather (In re Walker), 959 F.2d 894, (10th Cir. 1992) 18

Youakin v. Miller, 425 U.S. 231 (1976) 17

STATUTES

The Act of Mar. 3, 1891, 26 Stat. 989 16

Allotment Act of May 23, 1872, ch. 206, 17 Stat. 159 ..... 3, 11

Act of March 3, 1927, 44 Stat. 1349 12

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CODE

25 U.S.C. § 452 *et seq*. 14

25 U.S.C. § 465 2

25 U.S.C. § 501 *et seq*. 14

CODE OF FEDERAL REGULATIONS

25 C.F.R. §§ 151.1 – 151.14 2

25 C.F.R. § 151.2 . . . . . 2, 4

25 C.F.R. § 151.8 . . . . . 2, 3, 4, 6, 7

TREATIES

Treaty with the Creeks, Mar. 24, 1832, 7 Stat., 366 19

Treaty with the Potawatomi, Feb. 27, 1867, 15 Stat. 531 1

Treaty with the Seminole, Mar. 28, 1833, 7 Stat., 423 19

FEDERAL REGISTER

62 Fed. Reg. 55270, 55271 (Oct. 23, 1997) 9

RULES

Sup. Ct. Rule 10 8

LEGISLATIVE HISTORY

H.R. Rep. No. 51-3481 (Jan. 16, 1891) 2, 18

BOOKS

FELIX S. COHEN HANDBOOK OF FEDERAL INDIAN LAW (1982) 18

STATEMENT OF THE CASE

The Petitioner, the Absentee Shawnee Tribe of Oklahoma (hereafter "Absentee Shawnee") is seeking review of a decision by the Tenth Circuit Court of Appeals affirming a declaratory judgment and mandatory injunction entered by the District Court.[1]

The Citizen Potawatomi Nation[2] ("Potawatomi") is a federally recognized Indian tribe located on trust lands in what is today Pottawatomie County, Oklahoma. The Potawatomi came to this area in the late 1860s after purchasing a reservation from the United States pursuant to an 1867 Treaty reserving the land to their "exclusive use and occupancy."[3] Despite these treaty obligations, the Potawatomi have battled for over 100 years with federal authorities who have pursued a policy that the Potawatomi Reservation is held "in common" by the Potawatomi with some members of the Shawnee Tribe who wandered away from their Kansas reservation to eventually squat on the Potawatomi lands.[4]

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[1] The "Judgment Declaratory Judgment and Permanent Injunction" was not included in the Petitioner's Appendix. For the Court's convenience, the judgment is reproduced beginning at Resp. App. 1.

[2] The Potawatomi are organized under a constitution adopted pursuant to the Oklahoma Indian Welfare Act. Their constitutional name was "Citizen Potawatomi Indian Tribe of Oklahoma" until changed by an amendment adopted at a February 29, 1996, Secretarial Election. *See* Pott #95-81 (May 23, 1995).

[3] Treaty with the Potawatomi, 1867, 15 Stat. 531 (Feb. 27, 1867).

[4] "As to the Absentee Shawnees, it seems that some time about 1840 they left the main band then located upon the

The suit below arose when the Bureau of Indian Affairs ("BIA") refused to follow its own rules when taking land into trust within the "former reservation" of the Potawatomi. Federal statutes authorize the Secretary of the Interior to take lands "in the name of the United States into trust for Indians and Indian tribes."[5] Pursuant to that statutory authority, the Secretary of the Interior has promulgated regulations for taking land into trust.[6] Among other things, these regulations provide that land located within an Indian reservation may be taken into trust only when the tribe having jurisdiction over the reservation "consents in writing to the acquisition."[7] In Oklahoma, "*Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary."[8] The Potawatomi have a former reservation in Oklahoma. The Absentee Shawnee do not.

Upon hearing that the Absentee Shawnee may have submitted an application to the BIA for the United States to take land into trust within the former Potawatomi Reservation, the Potawatomi asked the BIA if any such

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Shawnee Reservation in Kansas, and after roaming and hunting for some time, settled down upon some of the country embraced within the limits of this [the Potawatomi] reservation, where they have remained ever since. They were not there by any treaty or Executive order, but the Government has long known of their presence there." H.R. Rep. No. 51-3481 (Jan. 16, 1891).

[5] *See, e.g.*, 25 U.S.C. § 465.

[6] 25 C.F.R. §§ 151.1-151.14.

[7] *Id.* § 151.8.

[8] *Id.* § 151.2, ¶ (f).

actions were pending.[9] In response, the BIA, in a letter dated September 17, 1992, refused to confirm or deny that any Absentee Shawnee trust applications were pending and announced that the Potawatomi and Absentee Shawnee "share a common former reservation area"[10] citing as authority an 1872 Allotment Act.[11] When the BIA refused to change this policy, the Potawatomi filed suit on October 30, 1992,[12] to prevent the BIA from taking land within the Potawatomi Reservation into trust on behalf of the Absentee Shawnee without first obtaining Potawatomi written consent as required by 25 C.F.R.

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[9] *Letter from Barrett to Collier of 8/25/92.* After an appeal of a Freedom of Information Act ("FOIA") request, the Potawatomi learned that the Absentee Shawnee had three trust applications pending for lands within the Potawatomi Reservation boundaries. *See Letter from Camacho to Minnis of 3/24/93.* On December 27, 1994, the Potawatomi received part of the record of the administrative appeal and learned for the first time that the Absentee Shawnee had six trust applications pending.

[10] *Letter from Collier to Barrett of 9/17/92.* For the Court's convenience, a copy of this letter is reproduced at Resp. App. 5. This opinion was restated in a letter to the Absentee Shawnee Governor. *See Letter from Bruner to Nuckolls of 10/19/94.*

[11] Allotment Act of May 23, 1872, ch. 206, 17 Stat. 159.

[12] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* No. CIV-92-2161R (U.S.D.C. W.D. Okla. Oct. 30, 1992) (complaint).

§ 151.8.[13] Notice of the suit was given to the Absentee Shawnee, who were invited to intervene.[14]

The Potawatomi moved for and obtained a preliminary injunction. They also moved for summary judgment. On January 4, 1993, the BIA filed a motion to dismiss for lack of indispensable party and for failure to exhaust administrative remedies.

On February 2, the District Court entered an order granting the BIA's motion to dismiss for failure to join an indispensable party, to-wit: the Absentee Shawnee who did not accept the Potawatomi invitation to intervene.

On February 25, 1994, the Tenth Circuit Court of Appeals found that "the BIA failed to sustain its burden" to offer evidence "showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land," reversed the District Court's order and remanded the case "for further proceedings." *Citizen Band Potawatomi Indian Tribe*

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[13] "An individual Indian or tribe may acquire land in trust status on a reservation other than its own **only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition**; * * * " (25 C.F.R. § 151.8 emphasis added). "[I]n the State of Oklahoma * * * 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." *Id.* § 151.2, ¶ (f).

[14] Thus, the Absentee Shawnee description of how they became involved in this litigation [Pet. at 1, n.1] is not entirely accurate. The Potawatomi opposed the Absentee Shawnee's motion to intervene in 1996 because of when it was filed, to-wit: 2.5 years *after* the Absentee Shawnee were invited to intervene, and on the eve of a decision by the trial court after appeals to the Tenth Circuit and the Interior Board of Indian Appeals (IBIA).

of Oklahoma v. Collier, 17 F.3d 1292, 1294, 28 Fed. R. Serv. 3d 677 (10th Cir. 1994). The panel briefly mentioned the 1872 Act, the sole authority cited by the BIA for the assertion of a "common reservation," stating:

> [T]o satisfy the BIA's burden of demonstrating the nature of the Absentee-Shawnee tribe's interest in the subject property * * * the BIA offers a copy of the 1872 Act giving the Secretary of the Interior the power to grant allotments to members of the Absentee-Shawnee tribe who fulfill certain requirements. This evidence is **irrelevant** * * * .

Id. at 1293-94 (emphasis added). Upon remand, the BIA renewed its motion to dismiss on the basis that the Potawatomi failed to exhaust administrative remedies. In response, the District Court on August 5, 1994, reserved ruling on the motion to dismiss and directed the Potawatomi "to pursue the administrative remedies (if any) from the September 17, 1992, letter from defendant to the plaintiff's Chairman." When both parties expressed uncertainty about what administrative remedies, if any, were available to the Potawatomi, the Court directed the BIA to inform the Potawatomi of the appropriate action to be taken.

As soon as the District Court's written order was filed, the Potawatomi sent a letter to the BIA requesting instructions on the administrative remedies available.[15] Two months later, in an October 12 letter, the BIA advised the Potawatomi that the "decision" of September 17, 1992, could be appealed to the Interior Board of Indian Appeals

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[15] *Letter from Minnis to Griffith of 8/9/94.*

("IBIA").[16] On October 28, 1994, the Potawatomi filed an appeal with the IBIA.

On September, 12, 1995,[17] the IBIA "affirmed" the BIA policy of recognizing a "common reservation area" finding that "it is reasonable for the BIA to treat the entire former Potawatomi Reservation as the reservation of both tribes for purposes of 25 C.F.R. Part 151," "and neither is required to obtain consent of the other under 25 C.F.R. 151.8."

On December 11, 1995, the Potawatomi submitted these findings to the District Court and renewed their motion for summary judgment. The BIA filed a cross motion for summary judgment. On March 15, 1996, the Absentee Shawnee were allowed to intervene as a third party and filed a brief in support of the BIA's motion for summary judgment.

On May 22, the District Court entered an order denying the BIA motion for summary judgment and granting summary judgment for the Potawatomi finding that the BIA is precluded by a prior Indian Claims Commission decision from asserting that prior to June 25, 1890, the Absentee Shawnee "had an undivided ownership interest in the [Potawatomi] reservation." *See* App. 30. Because "in privity with and represented by the United States in proceedings before the ICC," the Absentee Shawnee are

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[16] *Letter from Deerinwater to Barrett of 10/12/1994.*

[17] Two weeks after the briefing by all parties was completed, the Absentee Shawnee sought permission to file an amicus brief. This request was rejected as untimely. *Compare* Pet. at 1, n.1

also "precluded from re-litigating the issue of its ownership interest in the Potawatomi Reservation, if any, as of June 25, 1890." *Id.* at 37-38, 49. As to the IBIA determination that the Absentee Shawnee have "present-day rights in the Potawatomi Reservation which may be recognized by the BIA for purposes of 25 C.F.R. § 151.8," the District Court found this determination "contrary to law" and entitled to no deference. App. 46-47. Further, "no evidence" has been offered "of any treaty or agreement with the A-S [Absentee Shawnee] Tribe, Act of Congress, Executive order, purchase or any other act setting apart land within the boundaries of the Potawatomi Reservation for the use of the *A-S Tribe*" before or after June 26, 1890. App. 48-49 (emphasis in original).

The District Court entered a judgment declaring that the Potawatomi had a reservation in Indian Territory before it became the State of Oklahoma, that the reservation boundaries were those fixed by the survey of Orrin T. Morrill, and that the Absentee Shawnee did not have a reservation encompassing the land within the Potawatomi Reservation. Resp. App. at 2. Further, the Court also permanently enjoined the BIA from taking land into trust for the Absentee Shawnee located within the Potawatomi Reservation without first obtaining written consent from the Potawatomi as required by federal regulatory law.

From this judgment, the Federal Defendants and the Absentee Shawnee appealed. The Federal Defendants later dismissed their appeal.[18] On May 5, 1998, the Tenth

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[18] *See Potawatomi Indian Tribe of Oklahoma v. L.W. Collier*, No. 96-6259 (10th Cir. Mar. 21, 1997).

Circuit entered an opinion affirming the judgment. The Absentee Shawnee petitioned for rehearing which was denied on June 29.

REASONS WHY THE WRIT SHOULD BE DENIED

A petition for writ of certiorari is granted "only when there are special and important reasons therefor."[19]

[19] Sup. Ct. Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question

Because the Absentee Shawnee have not articulated any "special and important reason" for granting certiorari, the petition should be denied. Although four propositions are listed in the Petition, the Absentee Shawnee have only posed a single question [Pet. at i.] and have raised only one potentially valid reason for granting the writ: an alleged conflict between a Supreme Court decision and the Tenth Circuit opinion. The other propositions argued by the Absentee Shawnee[20] are not valid reasons for granting certiorari.

The Absentee Shawnee arguments are a bit schizophrenic. First, they imply that the Secretary has plenary power to recognize a "former reservation" for a tribe that never had a reservation.[21] Then they imply that the

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in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[20] These other arguments include the implication that the Potawatomi is not a tribe. *See* Pet. at 12-13. As support for this absurd position, the Absentee Shawnee cite from a letter. The Absentee Shawnee fail to advise that the statements in their letter were specifically rejected by the Indian Claims Commission. *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, 6 Ind. Cl. Comm. at 663. The Potawatomi have consistently been recognized by the federal government as an Indian tribe. *See, e.g.*, 62 Fed. Reg. 55270, 55271 (Oct. 23, 1997).

[21] "[T]he Secretary has discretionary authority to define 'former reservation area' for the purposes of the stated regulations." Pet. at 1. This is the Absentee Shawnee's Proposition II. *Id.* at 18. It is not a valid reason for granting certiorari nor do the Absentee Shawnee have standing to assert it. Virtually the only authority cited by the Absentee Shawnee in

Secretary's discretion must be informed by law citing the *Shoshone*[22] case, a decision that has no application to the dispute here.

By relying on the *Shoshone* case, the Absentee Shawnee defeat their own argument (Proposition III) that the IBIA decision is entitled to deference.[23] Although agency decisions construing statutes that it administers are entitled to deference, no deference is due here where the IBIA is construing a statute it does not administer and relies on a judicial decision. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 n.9 (1984).[24] No agency decision is entitled to deference when applying a particular case to the facts. *Cf. Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3258 (1986) ("legal rulings of the CFTC, like the legal determinations of the agency in *Crowell*, are subject to *de novo* review.").

The Absentee Shawnee's Proposition IV concerns the appropriateness of granting summary judgment. This

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support of their Proposition II is a law review article by their own attorney.

[22] *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937).

[23] Pet. at 19-24. Proposition III. Whatever the validity of this argument, it is not a reason for granting certiorari.

[24] The Absentee Shawnee argue that courts cannot be relied upon to correctly interpret the law and, therefore, must defer to the IBIA's superior expertise in this area to avoid "injustice." Pet. at 18. On the contrary, this IBIA decision is indicative of how far government agencies will stretch the law to uphold agency decisions which is why administrative appeals are often viewed as vain and futile exercises.

claim is not a valid reason for granting certiorari and is inconsistent with Absentee Shawnee position in the District Court where they supported the BIA motion for summary judgment.

The Absentee Shawnee have abandoned the original BIA contention that the Absentee Shawnee had a reservation based on an 1872 Allotment Act and argue instead that the District Court erred in not deferring to the IBIA conclusion that after 1890, the Absentee Shawnee somehow acquired a "former reservation" with the same boundaries as the Potawatomi. The Absentee Shawnee have no standing to object to the injunctive relief granted below nor to rely on the administrative ruling to which they were not a party. In any event, the declarative and injunctive relief entered below are entirely consistent with treaties, statutes, and previous rulings by this and other competent courts of record. Whatever discretion the Secretary of the Interior may have to recognize a "former reservation" for the purposes of taking land into trust, that discretion cannot be exercised by a BIA area director to recognize a "former reservation" for the Absentee Shawnee synonymous with the Potawatomi Reservation based on bureaucratic policy subsequent to the end of the reservation era in Oklahoma. This legal conclusion is not affected in any way by the IBIA decision. Because the issue is purely a legal one, this matter should never have been referred to an administrative law judge.

PROPOSITION: The Tenth Circuit has not decided the case in a way that conflicts with the Supreme Court's *Shoshone* decision.

In claiming that the Tenth Circuit decision is "in direct conflict with" *Shoshone*,[25] the Absentee Shawnee have, *at best*, engaged in misleading hyperbole and make comparisons that distort the *Shoshone* holding and the historical record. In *Shoshone*, a tribe submitted a damage claim to the Court of Claims against the United States for unlawfully taking a portion of the tribe's reservation. The claim was specifically authorized by an act of Congress[26] to make atonement to the Shoshone for taking a section of their reservation. The only issues in dispute were the date when the taking occurred and whether the tribe was entitled to interest. The Court of Claims set the date as August 13, 1891, when the Commissioner of Indian Affairs announced his opinion that the Arapahos "were entitled to enjoy the reservation equally with the Shoshone." *Shoshone*, 299 U.S. at 491-492. The Shoshone claimed the taking occurred "March 18, 1878, when the unlawful occupancy [of the Arapahos] began." The United States argued that the date should be March 3, 1927, when Congress authorized the claim.

The Supreme Court held that the Court of Claims erred in relying on the 1891 statement by the Commissioner of Indian Affairs. The Supreme Court did not sanction the arbitrary actions of the Commissioner of Indian Affairs but found them illegal *ab initio* and condemned them.

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[25] Pet. at 7.

[26] Act of March 3, 1927 (44 Stat. 1349, part 2).

> [T]he Commissioner of Indian Affairs was not empowered to fix the future policy of the government, still less to exercise in its behalf the power of eminent domain. He made no such attempt. All that his letter of August, 1891, [declaring both tribes were entitled to enjoy the reservation equally] expresses is an opinion as to the meaning and operation of notorious and accomplished facts. By deed as well as by word, he had done his part for more than thirteen years in shaping those facts to conform to his opinion.

Id. at 494. This finding destroys the Absentee Shawnee claim that the Secretary can arbitrarily create "reservation" rights. The Shoshone and Arapaho tribes today share the Wind River Reservation. They do not share a "former reservation." Congress consistently treated the Shoshone and Arapaho equally as to the Wind River Reservation but has **never** treated the Potawatomi and the Absentee Shawnee equally as to the Potawatomi Reservation.[27]

The Shoshone case involved a dispute between the Shoshone Tribe and the Arapahos over the Wind River Reservation in Wyoming involving entirely different

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[27] The Absentee Shawnee argue that they were equally compensated under the 1890 agreements. Pet. at 17. This is simply not accurate. The Absentee Shawnee tribal members were paid $65,000 "for improvements on their said allotments" but not for the land. 26 Stat., 1020 (art. IV). The tribe received nothing. The Potawatomi were paid $160,000 for their improvements to the land and $119,790.75 for their reservation. *Id.* at 1018 (art. IV). *See Citizen Band of Potawatomi Indians of Oklahoma v. United States*, 6 Ind. Cl. Comm. 658, 662 (1958).

tribes with different treaty rights and a different record of Congressional action. Oklahoma tribes' unique Indian history is reflected in federal statutes that separate all other Indian tribes from those in Oklahoma. All Indian tribes are covered by the Indian Reorganization Act [25 U.S.C.A. § 452 *et seq.*] except those in Oklahoma. Tribes in Oklahoma are covered by the Oklahoma Indian Welfare Act. 25 U.S.C.A. § 501 *et seq.* Further, this dispute arises over interpretation of a regulation provision that only applies to Oklahoma tribes. Thus, cases resolving disputes among tribes outside of Oklahoma have little value when cited as authority for resolving a dispute among Oklahoma Indian tribes, particularly a decision involving non-Oklahoma tribes that predates a final adjudication of an Oklahoma reservation claim.

The dispute here is not ownership *per se* of the lands within the Potawatomi reservation, but the Federal Defendants' now-abandoned claim that the Potawatomi and the Absentee Shawnee share the Potawatomi Reservation in common. Though the Absentee Shawnee may now own land within the former Potawatomi Reservation,[28] they had no reservation in Oklahoma and certainly none in common with the Potawatomi. Many persons have acquired interest in lands within the Potawatomi Reservation subsequent to 1890, but no one before or since (including the Absentee Shawnee) has acquired a

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[28] Prior to 1890, individual Absentee Shawnee resided on the Potawatomi Reservation and had allotments. However, residence and allotments did not create a valid Absentee Shawnee claim to having a reservation in common with the Potawatomi. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d at 1293-94.

"reservation" or a "former reservation" that includes the Potawatomi Reservation. The reservation era in Oklahoma ended before 1890. The Absentee Shawnee are trying to justify the impossible, *i.e.*, recognition of a "former reservation" for a tribe that never had a reservation.

How and when *Shoshone* was first cited in this case shows how remote the holdings therein are to the issues in this case. *Shoshone* was decided in 1937 and yet was never cited by the United States in two subsequent cases where the United States argued that the Absentee Shawnee had an Oklahoma reservation in common with the Potawatomi. The United States litigated this issue for seven years before the Indian Claims Commission,[29] but never cited *Shoshone*. The Commission rejected the United States' contention "that because the Absentee Shawnee were in possession of certain northern portions of this Oklahoma tract [the Potawatomi Reservation] for about thirty years (since the 1840s) before the Citizen Band came to Oklahoma that such possessory rights of the Absentee Shawnee constituted notice of their prior rights superior to the Potawatomi, to that portion of the Oklahoma Reservation which was occupied by Absentee Shawnee."[30]

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[29] The Potawatomi petition was filed February 19, 1951, and assigned docket number 96. The United States' claim of an Absentee Shawnee reservation interest was rejected in an opinion filed September 18, 1958.

[30] *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, 6 Ind.Cl.Comm. 658, 660 (1958) (opinion of the commission). In rejecting this claim, the Commissioners stated that: "It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not 'locations made for them' by

In the present case, the United States in support of its claim of a shared reservation never cited *Shoshone* to the District court, to the Tenth Circuit, or to the Interior Board of Indian Appeals ("IBIA") until after the IBIA decision. The first mention of *Shoshone* in this litigation was by an IBIA judge in an opinion dated September 12, 1995, nearly three years after suit had been filed. The IBIA acknowledged that the Indian Claims Commission decision "determine[d] ownership of the reservation lands on June 25, 1890, immediately prior to the taking."[31] However, the IBIA said that this ownership "is not determinative of rights in the reservation after that date." *Id.* at 69-70. The IBIA then attempted to justify Secretarial recognition that a tribe had a "former reservation" even though the tribe never had a reservation by citing *Shoshone* as an example of the Supreme Court's analytical approach to "reservation status cases." Using the *Shoshone* example, the IBIA examined an 1891 Act[32] and found

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the Government. They were, as defendant states, 'in the nature of squatters' * * * whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive [sic] branch of the Government or by the Citizen Band." *Id.* at 664.

[31] App. 69. "The Indian Claims Commission's decision in Docket 96 is binding on the Board as to the fact of a taking from the Citizen Band and as to the date of taking * * * [but] does not dictate the resolution of the issue here." App. 72.

[32] "The Act of Mar. 3, 1891, 26 Stat. 989 (1891 Act)." App. 64. This act confirmed an agreement by which the Absentee Shawnee gave up any claim to the Potawatomi Reservation. The IBIA claimed an Absentee Shawnee quit claim agreement to the Potawatomi Reservation legally created a reservation in common for the Absentee Shawnee.

that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation." App. 79. This is utter nonsense[33] which is why no one heretofore cited the *Shoshone* case as authority in support of the "common reservation" claim.

The Absentee Shawnee are now arguing a position broader than that adopted by the IBIA or heretofore asserted by any party, to-wit: that "the Absentee Shawnee had rights in the Potawatomi (Absentee Shawnee) [sic] Reservation by virtue of the pre-existing actual possession of land within the same reservation which was confirmed and recognized by Congress **prior to** and after 1891." Pet. at 4. (emphasis added).[34] Neither the *Shoshone* case nor any other authority cited by the Absentee Shawnee held that an Indian tribe acquires a reservation by merely living on another tribe's reservation for a period of time. This is the Absentee Shawnee's belated claim of aboriginal title first raised in their petition for rehearing filed with the Tenth Circuit.[35] The Absentee Shawnee

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[33] *See Citizen Band Potawatomi v. Collier*, No. CIV-92-2161R. App. 42-44.

[34] The Absentee Shawnee argue this case raises a question "of great importance in the State of Oklahoma" because other tribes share reservation areas. Pet. at 5, n.5. These other reservations are shared pursuant to lawful authority (agreements or executive orders). The tribes sharing these reservations have no interest in this litigation as reflected by the lack of amici.

[35] In their opening brief to the Tenth Circuit, the Absentee Shawnee list five issues, none asserted aboriginal title. *See* "Appellant Absentee Shawnee Tribe of Oklahoma's Opening Brief," 2, ¶ III (Apr. 4, 1997). *Youakin v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not

argue that the 1891 Act was "a clear recognition of the aboriginal right of occupancy of the Absentee Shawnee." Pet. at 16. This argument is made as part of the *Shoshone* proposition even though *Shoshone* was a claim for damages, not an aboriginal land claim. Aboriginal title is a reference to ancestral lands that the tribe "possessed" when non-Indians first had contact with the tribe. *See, generally,* FELIX S. COHEN HANDBOOK OF FEDERAL INDIAN LAW 473 (1982 ed.). The Absentee Shawnee contend that the theory applies to Potawatomi Reservation lands even though the Absentee Shawnee have no treaty with the United States, were "squatters" on the Potawatomi Reservation, and came through the reservation after wandering away from their tribe (absentees) more than a century after the Shawnees' initial contact with non-Indians. None of the cases cited by the Absentee Shawnee[36] remotely support their implication. For example, the Absentee Shawnee assert that they were "located within the subject area as early as 1840" and claim "possession of the subject lands" citing H.R.Rep. No. 51-3481, at 2-3 (1891). The actual language in the cited report is:

> As to the Absentee Shawnees, it seems that some time about 1840 they left the main band then located upon the Shawnee Reservation in Kansas, and after roaming and hunting for some time settled down upon some of the country embraced within the limits of this [Potawatomi] reservation where they have remained ever

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raised or resolved in the lower court."). *See also, Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992) (holding issue not raised in district court is waived on appeal).

[36] *See* Pet. at 10, n.11.

> since. They were not there by any treaty or Executive order, but the Government has long known of their presence there.

The Absentee Shawnee fail to advise the Court that the Seminoles and Creeks had exclusive possession and ownership of these lands under treaties from 1833 until forced to cede the lands in 1866 to the United States who in turn sold them to the Potawatomi under the Treaty of 1867. *See* Treaty with the Creeks, Mar. 24, 1832, 7 Stat., 366; Treaty with the Seminole, Mar. 28, 1833, 7 Stat., 423. The Absentee Shawnee twice cite[37] *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345, 62 S.Ct. 248, 251 (1941), but this case shows that their aboriginal claim is untenable:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. **If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes),** * * * .

The Absentee Shawnee had no ancestral claim to the land and never had exclusive occupancy. The Potawatomi Reservation in Oklahoma was never "the ancestral home of" the Absentee Shawnee.

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[37] Pet. at 6, 10.

CONCLUSION

The petition should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Plaintiff,

v.

No. CIV-92-2161-R

L.W. COLLIER, Jr., in his official capacity as the Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, and ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,

Defendants.

JUDGMENT
DECLARATORY JUDGMENT AND
PERMANENT INJUNCTION

(Filed Jul. 22, 1996)

Consistent with the court's May 22 order on the parties' summary judgment motions, judgment is hereby entered in favor of the plaintiff, the Citizen Band Potawatomi Indian Tribe of Oklahoma, and against the defendants, L.W. Collier, Jr. and the Absentee-Shawnee Tribe of Oklahoma, as set forth hereafter.

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED:

1. That pursuant to an 1867 treaty (15 Stat. 531), the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") purchased a reservation ("Potawatomi Reservation") in what was then Indian Territory and is now within the borders of the State of Oklahoma.

2. That the lands reserved for the Potawatomi under said treaty were subsequently surveyed by Orrin T. Morrill who established the boundaries of the Potawatomi Reservation as:

a. On the north, the North Fork of the Canadian River;

b. On the east, the west boundary of what is now Seminole County;

c. On the south, the Canadian River; and

d. On the west, a north-south line just west of the Indian Meridian,

all as more particularly described in the plat of the survey of township lines of the Potawatomi Reservation surveyed by Orrin T. Morrill under his contract of September 3, 1872, examined, found correct and approved by the Department of the Interior in 1873.

3. That the Absentee Shawnee Tribe of Oklahoma does not share a common "former reservation" as that phrase is used in 25 Code of Federal Regulations, Section 151.2(f), with the Citizen Band Potawatomi Indian Tribe of Oklahoma that is co-extensive with the boundaries of the Potawatomi Reservation described above.

IT IS FURTHER ORDERED AND ADJUDGED that L.W. Collier, as Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of Interior, his successors, officers, agents, servants, employees, attorneys and all those in active concert or participation with him are hereby PERMANENTLY ENJOINED from accepting lands located within the boundaries of said Potawatomi Reservation into trust status by the United States for the benefit of the Absentee Shawnee Tribe of Indian [sic] without complying with the terms of 25 Code of Federal Regulations, Section 151.8 (1992), including that regulations' requirement of first obtaining written consent from the Citizen Potawatomi Nation.

/s/ David L. Russell
United States District Judge

[ENTERED ON JUDGMENT DOCKET ON 7-22-96]

APPROVED AS TO FORM:

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

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[LOGO] [LOGO]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Anadarko Area Office
P.O. Box 368
Anadarko, Oklahoma 73005
Sep 17, 1992

Mr. John A. Barrett, Jr.,
Chairman, Citizen Band Potawatomi
Indian Tribe of Oklahoma
1901 South Gordon Cooper Drive
Shawnee, Oklahoma 74801

Dear Mr. Barrett:

This correspondence regards your request for a written response to your tribe's opposition to the United States taking in trust any lands on behalf of any Indian tribe, including the Absentee Shawnee, within the designated former reservation area of both the Absentee Shawnee and Citizen Band Potawatomi tribes. 25 Code of Federal Regulations part 151.8 states:

> "An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired."

Therefore, absent consent, fee simple acquisitions of land within the former reservation area by nonmembers is subject to tribal control.

However, your correspondence states the Citizen Potawatomi can provide citations and legal authorities to support a contention that the Absentee Shawnee had no lands in Oklahoma that were recognized as a reservation and had no legal right to any of the lands that lie within the area designated by Act of Congress to provide homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory. By Act of Congress approved May 23, 1872 (17 Stat., 159) titled Chap. CCVI. – An Act to provide Homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory, the Secretary of the Interior was directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, was to be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band and to each Absentee Shawnee Indian. The above specifically provided the Absentee Shawnee and Pottawatomie citizen band certificates include the same provisions.

In the different pieces of legislation researched, a number of designations were given the thirty mile square tract lying west of the Seminole reservation in the Indian Territory: "lands selected for the Pottawatomie Indians", "Pottawatomie (and Absentee Shawnee) Reservations", "Pottawatomie Reservation", however, we do not believe any can be construed to be a declaration establishing a former reservation area solely for the Citizen Band Potawatomi Indian tribe of Oklahoma. Both tribes occupied the area on the same terms prior to March 3, 1891, wherein the Citizen Band of Pottawatomie Indians of the

Indian Territory and the Absentee Shawnee Indians of the Indian Territory simultaneously ceded and opened to public settlement lands included in "Schedule of lands within the Sac and Fox, Iowa, Pottawatomie (and Absentee Shawnee) Reservations, in Oklahoma Territory.["]

Therefore, we believe the Citizen Band of Potawatomi Indians and the Absentee Shawnee Indian Tribe of Oklahoma share a common former reservation area for purposes of fee simple acquisitions, and neither are required to secure nonmember consents required by 25 Code of Federal Regulations, 151.8. If further information or assistance is needed, please advise.

Sincerely,

/s/ L. W. Collier, Jr.
Area Director

Attachments